DATE: JUNE 5, 1996

CASE NO: 94-INA-580

In the Matter of

MOHAWK MFG. CORP.
Employer

on behalf of

JULIO ERNESTO COCHA
Alien

Before: Jarvis, Vittone and Wood
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

ORDER OF REMAND

This case arises from Mohawk Mfg. Corp.'s ("Employer") request for review of the U.S. Department of Labor Certifying Officer's ("CO") denial of a labor certification application. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On March 4, 1992, the Employer filed a Form ETA 750, Application for Alien Labor Certification, with New Jersey Employment Services on behalf of the Alien, Julio E. Cocha.

AF 1, 16. The job opportunity was listed as "Portable Grinder Operator," and required six months of experience in the job offered, or six months of experience in the related occupation of "Machine Operator - any type." AF 16.

On February 3, 1993, the Employer was authorized to advertise the position as required by the regulations. AF 18-19. The instructions given to the Employer indicate that the thirty-day recruitment period would run from February 10, 1993 through March 12, 1993 and that the Employer was required to report the results of its recruitment effort by April 26, 1993. The instructions also indicate that the Employer should place its advertisement "within the first 7 days of the 30-day recruitment period." AF 19.

The AF reveals that the New Jersey Employment Services referred applicant Robert McElroy to the Employer on February 19, 1993, applicant Travis Jordan on February 24, 1993, applicant Anthony Johnson on March 4, 1993, and applicant George Duke on March 4, 1993. AF 34. In addition, it appears that the Employer ran its advertisement in *The Courier News* on March 2, 3, and 4 of 1993. AF 32.

On April 20, 1993, the Employer sent a letter to the New Jersey Employment Services stating that it had received no responses to its job advertisements. AF 32. The file was thereafter referred to the CO on May 7, 1993. AF 35-36.

The CO subsequently issued a Notice of Findings ("NOF") proposing to deny the application. AF 37-39. The CO stated:

> According to employer's documentation dated April 20, 1993, there were no responses to the ad which appeared in The Courier News on March 2-4, 1993. However, information furnished by the Flemington local Job Service Office indicates that between the period February 16, 1993 through March 4, 1993, four (4) applicants were referred to the employer for interview. The local office representative indicates that the employer sent the applicants, Robert McElroy, Travis Jordan, Anthony Johnson and George Duke, employment applications to complete but employer never actually interviewed any of the applicants. The local office indicates employer subsequently informed the local office that the position had been filled by the alien. If this information is accurate, employer's actions likely resulted in the non-hire of a qualified U.S. worker. Since the information regarding referral activity as furnished by the local office conflicts with employer's documentation of recruitment results, the local office's allegations must be addressed.

AF 38. The CO noted that the Employer could rebut her findings by addressing the above information and by submitting documentation that clearly shows that each of the applicants was not qualified, willing or available at the time of initial consideration and referral. AF 37. In addition, the CO also required the Employer to "document willingness to readvertise if we determine that readvertising is in order."

The Employer submitted a rebuttal on May 11, 1994. AF 40-46. Initially, the Employer stated that it regretted "the error in [its] letter of April 20, 1993 which indicated that there was no response to the advertisement," explaining that "[w]e ourselves interview people for employment all the time and did not check our records thoroughly enough at the time of writing that letter." AF 46. The Employer also stated that it may have told the New Jersey State Employment Services that the Alien was working for it, but never indicated that

the Employer was not willing to consider U.S. workers for the position. AF 45. In regard to the four U.S. workers who showed interest in the position, the Employer stated that two of the workers "never showed up and never filled out any type of application," but that two other applicants, Mr. McElroy and Mr. Duke, did apply for employment. Copies of these candidates' applications were attached to the Employer's rebuttal. The Employer indicated, however, that Mr. Duke's resume "does not indicate any type of work which would qualify him for employment with us and when we confirmed this with him, we did not offer him a position." AF 46. In regard to Mr. McElroy, the Employer stated that he was "somewhat" qualified and indicated that it told him after his interview that it "would get back to him in a couple of weeks, after we had interviewed any other applicants." The Employer indicated, however, that when it called applicant McElroy back after two weeks, he informed it that he had another job and was "not available for employment." AF 46.

The CO issued a Final Determination ("FD") denying labor certification on June 2, 1994. AF 49-51. The CO indicated that she accepted "employer's comments regarding the allegation made by the local office" and the fact that "applicants Duke, Jordan and Johnson were rejected for lawful job-related reasons." AF 49. However, the CO indicated that she found applicant McElroy to be qualified for the position and found the Employer's rebuttal evidence insufficient to "adequately demonstrate specific lawful job-related reasons for rejection of this applicant." The CO explained that she found the Employer's statement that the applicant was "somewhat" qualified unclear, considering the fact that the applicant's resume indicates that during a one and a half year period he worked as a Spray Painter and Grinder, and also cleaned metal. She stated that although his application does not "break out" the length of time he spent performing each function, "it appears from employer's recruitment report that the applicant was qualified for this position on the basis of employer's related experience requirement of six months experience as a Machine Operator (any type)." AF 49. In addition, the CO also indicated that it was unclear as to "how many weeks employer waited before attempting to recontact the applicant." The CO stated that the "Employer's treatment of this applicant's candidacy resulted in the non-hire of a qualified U.S. worker who was willing and available for the position at the time of initial consideration and referral." AF 49.

The Employer filed a request for review on June 23, 1994 (AF 61) and a supporting brief on October 6, 1994.

DISCUSSION

A CO cannot raise an issue for the first time in the FD. *See generally, Marathon Hosiery Co., Inc.,* 88-INA-420 (May 4, 1989) (*en banc*); *Dr. & Mrs. Fredric Witkin,* 87-INA-420 (May 4, 1989). Raising an issue for the first time in the FD deprives the employer of the opportunity to rebut or cure, denies due process, and violates section 656.25(c)(20) of the regulations. *Downey Orthopedic Medical Group,* 87-INA-674 (Mar. 14, 1988) (*en banc*); *Counterpoint Development Co.,* 89-INA-154 (Mar. 12, 1990); *Tarmac Roadstone (USA), Inc.,* 87-INA-701 (Jan. 4, 1989). Thus, if a CO bases his or her FD on evidence not first discussed in an NOF, the matter may be remanded to the CO for clarification and the issuance of a new NOF. *See Dr. Mary Zumot,* 89-INA-35 (Nov. 4, 1991).

Here, the NOF only required that the Employer address the local Job Service Office's allegations that it had referred four applicants to the Employer and that the Employer had thereafter informed it that the position had been filled by the Alien. Thus, the CO's first

opportunity to determine the validity of the Employer's reasons for rejecting the applicants was not until after she received the Employer's response to the NOF, where it discussed its reasons for rejecting the U.S. applicants. However, instead of issuing another NOF in order to allow the Employer the opportunity to rebut her finding that it had failed to adequately document lawful, job-related reasons for its rejection of applicant McElroy, the CO issued her FD. Accordingly, we vacate the denial of certification and remand the case to the CO for issuance of a new NOF in order to allow the Employer to respond to her findings.

ORDER

The Final Determination denying alien labor certification is VACATED, and the case REMANDED to the CO for further proceedings.

For the Panel:

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DONALD B. JARVIS
Administrative Law Judge

DBJ/mfg/bg